89-1978

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOSLYN MANUFACTURING COMPANY,
Petitioner,

v.

T. L. JAMES & COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Hazardous waste sites present a national problem that will cost billions to rectify.[1] Congress passed CERCLA to provide a national plan in which "owners or operators" of hazardous waste facilities are liable (to the government or to private parties for contribution) for a share of the cleanup cost.

Many sites now being cleaned up were owned or operated by corporations which have been dissolved or are otherwise unable to pay their fair share of CERCLA liability. In this contribution case, the Fifth Circuit held a parent corporation could only be liable for cleanup costs at such a site if its dissolved subsidiary had been a sham under state law.

The Fifth Circuit expressly declined to follow the Second Circuit and other federal courts which have held shareholders and parent corporations liable under CERCLA by reading "owner or operator" to include those who actively participated (or could have) in the management of the facility.

The Fifth Circuit also chose not to follow decisions of this Court and other circuits in which a valid corporate

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[1] For example, one Congressional study estimates that the amount of federal funds needed to clean up sites listed on the NPL would "*rang[e] from about $16.7 to $23.8 billion, far in excess of the available $8.5 billion.*" Survey & Investigations Staff, Report to the House Committee on Appropriations on the Status of the Environmental Protection Agency's Superfund Program, at Summary (March 1988) (emphasis in original), reprinted in Practicing Law Institute, Practical Approaches To Reduce Environmental Cleanup Costs 409 (1988).

form under state law is disregarded under federal common law to serve the purpose of a federal statute; here, the subsidiary's separate identity might have been disregarded to fulfill CERCLA's purpose of having a person which profited from the disposal of hazardous waste, the parent corporation, help clean up the disposal site.

Joslyn believes the lower courts' refusal to even consider whether a parent corporation could be directly liable under CERCLA as an "owner or operator" is inconsistent with CERCLA's purposes. Joslyn believes it was further error to apply a state's rigid alter ego analysis, as such an approach threatens CERCLA's status as a truly national plan. The present uncertainty encourages litigation and discourages voluntary cooperation in cleanup efforts.

The Court can resolve these conflicts by deciding this case, specifically:

1. Under what circumstances is a parent corporation directly responsible for environmental remediation costs as an "owner or operator" of its subsidiary's hazardous waste facility under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. Section 9601, *et seq.*?

2. In determining whether to disregard a subsidiary's separate corporate form to hold its parent corporation responsible for environmental remediation costs under CERCLA, should CERCLA's purpose of having persons who benefited from the disposal of hazardous waste also share in the cleanup costs be considered under a federal common law analysis, rather than state law?

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Joslyn Manufacturing Co.
T. L. James & Co., Inc.
Powerline Supply Co., Inc.
Nelda S. Elliott and Bill Elliott
Louisiana & Arkansas Railway Co.
Lance D. Alworth
Floyd Benjamin James
George William James

RULE 28.1 LISTING

Petitioner Joslyn Manufacturing Company is a wholly owned subsidiary of Joslyn Corporation, a publicly held and traded corporation with outstanding securities in the hands of the public. Affiliates of Petitioner include other subsidiaries of Petitioner's parent corporation, being Joslyn Clark Controls, Inc., Joslyn Canada Inc., Joslyn Hi-Voltage Corporation, Joslyn Electronic Systems Corporation, Joslyn Power Products Corporation, Joslyn Research and Development Corporation, ADK Pressure Equipment Corporation, ADK Pressure Equipment Limited, Sunbank Family of Companies, Inc., Sunbank Electronics, Inc., Air-Dry Corporation of America, Royal Diecasting Corporation and Joslyn Foreign Sales Corporation.

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IN THE

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OPINIONS BELOW

Joslyn Manufacturing Co. v. T. L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990), reproduced herein as Appendix A; and *Joslyn Corp. v. T. L. James & Co., Inc.*, 696 F.Supp. 222 (W.D. La. 1988), reproduced herein as Appendix B.

JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on January 29, 1990. A petition for rehearing filed by Powerline Supply Company was

denied on March 26, 1990, and is reproduced herein as Appendix C. This Court has jurisdiction to issue the requested writ of *certiorari* under 28 U.S.C. Section 1254(1).

FEDERAL STATUTES INVOLVED

42 U.S.C. Section 9601(20)(A)
42 U.S.C. Section 9607(a)
42 U.S.C. Section 9613(f)(1)

(See Appendices D, E & F)

STATEMENT OF THE CASE

Factual Background

In 1935, T. L. James & Company, Inc. ("James Company") of Ruston, Louisiana paid $20,110 for 120 shares of voting common stock and 200 shares of non-voting preferred stock in Lincoln Creosoting Co., Inc. ("Lincoln"). While 80 shares of voting common stock were given to Messrs. Tooke and Hayes, the men who would directly supervise operation of Lincoln's wood-treating facility in Bossier City, Louisiana, they endorsed their shares back to James Company until such time as dividends repaid the original value of their shares (which never occurred). During Lincoln's entire operating life from 1935 until 1950, James Company controlled 100% of Lincoln's stock.

It is undisputed that Lincoln disposed of hazardous waste at the Bossier City facility. Lincoln contaminated

its drainage ditch, large drainage slough, and its treated wood railroad track area. It paved blacktop roads on the site with creosote sludges. This contamination was readily visible and could not have gone unobserved. The minutes of Lincoln's 1944 shareholder meeting reflect that spending money to improve drainage was discussed, but no action was ever taken by Lincoln or James Company.

James Company profited from Lincoln. While no dividends were ever paid on common stock, James Company received dividend income from its sole ownership of Lincoln's preferred stock.

James Company provided all of Lincoln's financing, with credit running as high as $800,000. Lincoln had an open line of credit with James Company. James Company guaranteed Lincoln's larger credit accounts.

T. L. James was president of both James Company and Lincoln until his death in 1944. He was also James Company's major shareholder and voted James Company's stock in Lincoln by proxy. Until his death, five of the seven members of Lincoln's Board of Directors were officers, directors and/or shareholders of James Company. T. L.'s son, G. W. James, served as Lincoln's president from 1944 to 1950. G. W. James was also an officer of James Company. James Company bought out Hayes in 1944 and sold his stock at cost to G. W. James' cousin, J. E. Lacy. Lacy then became Lincoln's head of production and a Lincoln director. With Lacy's vote, James Company continued to control Lincoln's Board of Directors for the remainder of its existence.

Lincoln's registered office with the Louisiana Secretary of State was the James Building in Ruston; Lincoln had no lease and paid no rent at that address. A common employee of the two companies, V. A. Davidson, worked at

James Company headquarters and served as liaison between Lincoln personnel at the treatment plant and T. L. James or G. W. James. Davidson received daily reports from the plant and an itemized statement of all collections and disbursements by Lincoln's plant personnel.

When the I.R.S. sought to disallow his salary as Lincoln president, G. W. James stated that from 1944 through 1950 he was in constant contact with plant management by phone and held conferences with them in Ruston not less than once a month and as often as once a week.

Lincoln sold the facility to Joslyn in 1950. Lincoln then repurchased 41 shares of common stock held by certain Lincoln employees and Tooke's heirs for $2250 a share. In 1951, James Company donated its 120 shares of Lincoln common stock to Centenary College which then received the largest share of Lincoln's assets on its dissolution. James Company received a tax benefit from the donation. Lincoln's Certificate of Dissolution was executed on December 19, 1952.

Joslyn owned and operated the facility until 1969 when it sold the property to Koppers, Inc.

In 1986 and 1987, the Louisiana Department of Environmental Quality issued orders directing James Company, Joslyn and subsequent site owners to clean up the Lincoln site pursuant to the Louisiana Environmental Quality Act ("LEQA"). These state administrative proceedings have been inactive during the course of this case. Joslyn has begun remedial action and expects the cleanup to cost several million dollars.

Proceedings Below

Joslyn brought suit in the United States District Court for the Western District of Louisiana against James Com-

pany and others seeking contribution for cleanup costs incurred to date and a declaratory judgment of liability for future contribution under both CERCLA and LEQA. Jurisdiction was based on 42 U.S.C. Section 9613(b).

Other defendants (including Third-Party Defendant Lance D. Alworth who joins this petition) cross-claimed against James Company. Defendants Powerline Company, Nelda Elliott and Bill Elliott also filed third-party actions against G. W. James and F. B. James (G. W.'s brother, James Company's president and a former Lincoln Director).

The trial court, Stagg, J., granted summary judgment in favor of James Company, G. W. James and F. B. James on the ground that the facts would not support piercing the corporate veil under Louisiana law, relying on *United States v. Jon-T Chemicals*, 768 F.2d 686 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014, 106 S.Ct. 1194 (1986). The *Jon-T* analysis does not include any consideration of CERCLA's purposes in determining whether a subsidiary's corporate identity should be disregarded to reach its parent.

Judge Stagg expressly declined to follow the analysis of other federal courts, including the Second Circuit, in which corporate officers and parent corporations have been held directly liable as an "owner or operator" under CERCLA. *Joslyn Corp. v. T. L. James & Co., Inc.*, 696 F.Supp. 222 (W.D. La. 1988).

The Fifth Circuit affirmed in all respects.[2] It also expressly declined to follow other federal courts' reading of "owner or operator":

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[2] The lower courts granted summary judgment against Joslyn on its CERCLA and LEQA claims under the same analysis. Joslyn also seeks review of the judgment entered against it on its claims under LEQA.

> Joslyn urges this court to read CERCLA's definition of "owner or operator" liberally and broadly to reach parent corporations whose subsidiaries are found liable under the statute. In doing so, Joslyn urges us to follow the several courts, including the Second Circuit, which have extended CERCLA liability to parents. See *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Mottolo*, 695 F.Supp. 615 (D. N. H. 1988); *Colorado v. Idarado Mining Co.*, 707 F.Supp. 1227 (D. Col. 1989); *Vermont v. Staco, Inc.*, 684 F.Supp. 822 (D. Vt. 1988); *Idaho v. Bunker Hill Co.*, 635 F.Supp. 665 (D. Idaho 1986). We decline to do so.

Joslyn Manufacturing Co. v. T. L. James & Company, 893 F.2d 80, 82 (5th Cir. 1990).

ARGUMENT

I.

The Decision Below Creates A Conflict Among The Federal Courts As To What Degree of Involvement In The Management Of A Subsidiary's Hazardous Waste Facility Will Render A Parent Corporation Directly Liable As An "Owner Or Operator" Under CERCLA.

A. The Statutory Framework.

CERCLA Section 113(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under Section 107(a)" for site clean-ups, and that "[s]uch claims . . . shall be governed by federal law." 42 U.S.C. Section 9613(f)(1). CERCLA Section 107(a), 42 U.S.C. Section 9607(a), in relevant part, imposes liability on the following persons:

> (1) the owner and operator of a vessel or facility, [or]
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of. . .

CERCLA Section 101(20)(A), 42 U.S.C. Section 9601(20)(A) defines "owner or operator" in relevant part as:

> (ii) in the case of an onshore facility . . . any person owning or operating such facility. . . Such term does not include a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

B. Some Courts, Notably The Second Circuit, Have Adopted An Interpretation Of "Owner Or Operator" Which Can Include A Parent Corporation Without Finding Its Subsidiary To Be A Sham.

In *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), the Second Circuit imposed direct CERCLA liability on a corporate officer and shareholder, LeoGrande. It did so by finding that the exclusion from "owner or operator" set forth in Section 9601(20)(A) of "a person who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the facility," implies that a shareholder who participates in the management of the corporation is liable under CERCLA. *Id.*, 1052. LeoGrande's liability was "direct" in the sense that he was held liable because of his personal role and responsibility in the management of the facility, not because the corporation (which technically owned the facility) was a sham.

This analysis was derived from *United States v. Northeastern Pharmaceutical and Chemical Company, Inc.*, 579

F.Supp. 823 (W.D. Mo. S.D. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S.Ct. 146 (1987) ("NEPACCO"):

> The statute literally reads that a person who owns interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste. Such a construction appears to be supported by the intent of Congress. CERCLA promotes the timely cleanup of inactive hazardous waste sites. It was designed to insure, so far as possible, that the parties responsible for the creation of hazardous waste sites be liable for the response costs in cleaning them up. Congress has determined that the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up. The Eighth Circuit adopted the definition given "owner or operator", 33 U.S.C. Section 1321(a)(6), by the Fifth Circuit in *United States v. Mobil Oil Corporation*, 464 F.2d 1124, 1127 (5th Cir. 1972):
>
> > The owner-operator of a vessel or a vacility [sic] has the capacity to make timely discovery of oil discharges. The owner-operator has power to direct the activities of persons who control the mechanisms causing the pollution. The owner-operator has the capacity to prevent and abate damage. Accordingly, the owner-operator of a facility governed by the WPCA, such as the Mobil facility here, must be regarded as a "person in charge" of the facility for the purposes of Section 1161. A more restrictive interpretation would frustrate congressional purpose by exempting from the operation of the Act a large class persons who are uniquely qualified to assume the burden imposed by it.

Id., 579 F.Supp. 823, 848-849. Accord: *United States v. Nicolet, Inc.*, 712 F.Supp. 1193 (E.D. Pa. 1989); *United States v. Kayser-Roth Corp.*, 724 F.Supp. 15 (D.R.I. 1989);

United States v. Conservation Chemical Co., 628 F.Supp. 391 (W.D. Mo. 1985); *United States v. Carolawn*, 21 ERC 2124 (D.S.C. 1984); *United States v. Mirabile*, 15 E.L.R. 20994 (E.D. Pa. Sept. 4, 1985); *United States v. Mirabile*, 23 ERC 1511 (E.D. Pa. 1985).

This analysis has been used to find a parent corporation directly liable as an owner or operator with respect to a subsidiary's facility where the parent had the capacity to make timely discovery of waste disposal at the facility; the power to direct the activities of persons who controlled the mechanisms causing the pollution; and the capacity to prevent and abate damage. *Idaho v. Bunker Hill Co.*, 635 F.Supp. 665 (D. Idaho 1986).

C. Both The Trial Court And The Fifth Circuit Expressly Declined To Apply This Interpretation Of "Owner Or Operator."

Joslyn argued below that James Company was directly liable as an owner or operator because it owned a controlling interest in Lincoln; had actual knowledge of the disposal of chemicals at the site; had and exercised power over the persons who controlled the mechanisms causing the pollution (and therefore had the capacity to prevent and abate damage); and had earned substantial income from Lincoln.

Both the district court and the Fifth Circuit expressly declined to follow this approach and limited their attention to whether Lincoln's corporate veil should be pierced under state law. This Court should decide whether this was error and, if so, further determine the level of participation which will render a parent corporation directly liable as an "owner or operator" under CERCLA.

II.

The Decision Below Creates A Conflict In The Federal Courts As To The Respect Afforded The Corporate Form Of A Responsible Party Under CERCLA.

A. This Court Has Applied A Federal Common Law Rule In Which A Valid Corporate Form Under State Law Is Disregarded When Necessary To Fulfill The Purpose Of A Federal Statute.

CERCLA Section 113(f)(1), 42 U.S.C. Section 9613(f)(1), expressly provides that federal law shall apply in CERCLA contribution actions. This Court has recognized a federal common law rule in which the corporate form is disregarded to fulfill a federal legislative policy. *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983); *Anderson v. Abbott*, 321 U.S. 349 (1944).

The First Circuit applied this rule in an environmental context in *Town of Brookline v. Gorsuch*, 667 F.2d 215 (1st Cir. 1981). In that case, the court was asked to review a decision of the acting regional administrator ("ARA") of the Environmental Protection Agency that MATEP, a corporation organized under the laws of Massachusetts whose stock was owned by Harvard, qualified for the PSD exemption in the Clean Air Act as a nonprofit health or education institution. Brookline challenged that finding on the grounds that MATEP was organized as a Massachusetts for-profit corporation and that its corporate veil could not be pierced to find a "joint arrangement" with Harvard under Massachusetts law.

In upholding the ARA's decision, the court relied on this federal rule:

> The general rule adopted in the federal cases is that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." *Id.* at 738 (citations omitted). In applying this rule, fed-

> eral courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form, see *Schenley Distillers Corp. v. United States*, 326 U.S. at 437, 66 S.Ct. at 249; *Flink v. Paladini*, 279 U.S. 59, 62, 49 S.Ct. 255, 255, 73 L.Ed. 613 (1929), an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine, *Capital Telephone Co. v. FCC*, 498 F.2d at 738-39. As we observed above, the purposes of the PSD exemption are not affected by the corporate form of the nonprofit health or education institution. The ARA acted in accordance with federal law in looking beyond MATEP to Harvard's ownership and the relationship with the hospitals.

Id., 221.

Courts applying this analysis have found CERCLA also does not place importance on the corporate form:

> As stated above, one of CERCLA's expressed goals is to ensure "that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." *Dedham Water Co., supra*, 805 F.2d at 1081 (quoting *Reilly Tar & Chem. Corp., supra*, 546 F.Supp. at 1112). This goal would be frustrated if the mere act of incorporation were allowed to impede the recovery of response costs, for a nonincorporated violator could avoid liability simply by changing company structure. Furthermore, the absence of explicit statutory language addressing the effect of incorporation, the Act's strict liability scheme, and the broad and encompassing categories of potentially responsible parties ineluctably lead the Court to the conclusion that CERCLA places no importance on the corporate form.

United States v. Mottolo, 695 F.Supp. 615, 624 (D.N.H. 1988). See also *United States v. Kayser-Roth Corp.*, 724

F.Supp. 15 (D.R.I. 1989); *United States v. Nicolet, Inc.*, 712 F.Supp. 1193 (E.D. Pa. 1989).

B. Neither The Trial Court Nor The Fifth Circuit Applied This Federal Rule And Instead Relied Solely On A State Law "Alter Ego" Analysis.

The lower courts did not discuss petitioner's citation of the cases set forth in the preceding subsection. The district court did find that federal law applied, but concluded that the Fifth Circuit used the same alter ego test in both federal question and diversity cases, citing *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 690 n.6 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014, 106 S.Ct. 1194, 89 L.Ed. 2d 309 (1986). Although *Jon-T* involved Texas law, the district court used *Jon-T*'s laundry list of 12 technical factors to determine whether to pierce Lincoln's corporate veil under Louisiana law. This analysis gave no weight to CERCLA's purposes or the equity of having James Company contribute to the cleanup to the extent it was involved in, and benefited from, the disposal of hazardous waste at Lincoln's plant.

The Fifth Circuit approved this approach, rejecting not only the federal common law approach but also the arguments of petitioner and the State of Louisiana (as *amicus*) that Louisiana law also allows a court to disregard the separate corporate identity of even a valid corporation when necessary to serve a compelling state interest.

III.

This Court Should Resolve These Conflicts.

The scope of "owner or operator" under CERCLA is important not only to private CERCLA contribution actions but also to the government's actions for environmental remediation costs. Joslyn believes the lower courts

erred in refusing to even consider whether a parent corporation could be directly liable under CERCLA as an "owner or operator" without "piercing the corporate veil." Joslyn believes it was further error to apply a state's rigid alter ego analysis, as such an approach threatens CERCLA's status as a truly national plan. The present uncertainty encourages litigation and discourages voluntary cooperation in cleanup efforts. This Court should decide these issues.

CONCLUSION

Joslyn respectfully requests the Court to grant this petition and issue a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Joining in the Petition

APPENDICES

APPENDIX A

JOSLYN MANUFACTURING COMPANY,
Plaintiff-Appellant,

v.

T.L. JAMES & CO., INC.,
Defendant-Appellee,

v.

POWERLINE SUPPLY CO., INC.,
Defendant Third Party
Plaintiff-Appellant,

and

Nelda S. ELLIOT, Bill Elliott, and Lance D. Alworth, Louisiana and Arkansas Railroad Co.,
Defendants-Appellants,

v.

Floyd Benjamin JAMES and George William James, Sr.,
Third Party
Defendants-Appellees.

No. 88-4901.

United States Court of Appeals,
Fifth Circuit.

Jan. 29, 1990.

* * * * *

Appeals from the United States District Court for the Western District of Louisiana.

Before GEE and JONES, Circuit Judges, and HUNTER, District Judge:*

* District Judge of the Western District of Louisiana, sitting by designation.

GEE, Circuit Judge:

Appellant contends that the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Louisiana Environmental Quality Act ("LEQA") impose direct liability on parent corporations for violations of their wholly-owned subsidiaries. Appellant further contends that, absent such liability, the corporate veil should be pierced to impose liability in the instant case. We disagree with both contentions.

Facts

This case arises from the environmental cleanup of a former creosoting plant constructed by the Lincoln Creosoting Company, Inc. ("Lincoln") in Bossier City, Louisiana. Under Lincoln's creosoting recovery system, raw creosoting chemicals dripped from the treating cylinders to a sump pit located underneath the system. Lincoln recovered some creosoting chemicals from the sump. The remaining chemicals were discharged into an open ditch and flowed to the eastern portion of the site, where the chemicals collected in a slough. From the slough, the creosoting chemicals were washed away by rain to the surrounding land areas and waterways.

Lincoln was incorporated in 1935 when C.A. Tooke and J.R. Hayes proposed a business arrangement with T.L. James whereby T.L. James Co., ("James Co.") would put up the initial capital in return for stock in the company. Under the arrangement, Tooke and Hayes would purchase 40% of the 200 shares of common voting stock and James Co. would own 60% of the common stock and all 200 shares of the non-voting preferred stock of Lincoln. Tooke and Hayes endorsed their shares over as security for their unpaid capital subscription.

At the initial Board of Directors meeting, Tooke was elected Vice President and designated "General Manager with full power and discretion to conduct the affairs" of Lincoln. T.L. James was elected President; his son G.W. James later succeeded him. Lincoln originally established a seven member Board of Directors. Five of these directors were associated with James Co., Tooke and Hayes held the other two seats. Lincoln maintained separate financial books and a separate corporate banking account. Only Hayes and Tooke had check-signing authority. Lincoln regularly held shareholders and directors meetings.

Dissatisfied with Lincoln's performance in the mid-1940's, G.W. James bought out Hayes, G.W. James, then president of Lincoln, hired Lacy, a former James Co. employee to replace Hayes. In 1945 Lincoln reduced its Board of Directors to five. The new Board consisted of three Lincoln employees who had no ties to James Co. and two persons associated with James Co. In 1947, the Board expanded to eight members and consisted of four Lincoln employees and four persons associated with James Co.

Lincoln owned its own property and equipment, and maintained its own employees, payrolls, insurance, pension system, and workman's compensation program. Lincoln filed its own tax returns.

In 1950 Tooke died and Lincoln was sold to Joslyn Manufacturing Co. ("Joslyn"). Joslyn owned and operated the plant until Koppers Company, Inc. ("Koppers") purchased it in 1969. Koppers owned the plant until 1971. The property then passed through five separate owners, the last of which subdivided the property. Appellant Powerline Supply Company ("Powerline") purchased one of the subdivided lots in 1982. Appellant Alworth purchased one such lot in 1983. Appellant Louisiana and Arkansas Rail-

way Company ("Railway") owned property adjoining the plant site from 1923 through 1972.

Joslyn filed this action in the district court invoking that court's exclusive jurisdiction under Section 113(b) of the CERCLA. 42 U.S.C. Section 9613(b). Joslyn brought this action claiming that James Co. was liable under 42 U.S.C. Section 9607(a)(2) as an "owner or operator." Joslyn also advanced claims under the Louisiana Environmental Quality Act ("LEQA"). La.Rev.Stat.Ann. Section 30:2001 (West Supp. 1989). The defendants included James Co., Railway, and Powerline. Powerline filed third-party complaints against, *inter alia*, Lance Alworth; Alworth then filed a cross-claim against James Co.

The district court granted James Co.'s motion for summary judgment, concluding that Congress, in enacting CERCLA, did not intend an exception to the general rule in corporation law of limited liability. 696 F.Supp. 222.

Discussion

CERCLA provides in relevant part:

Section 107(a)(2), 42 U.S.C. Section 9607(a)(2), makes liable:

> (a) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of. . . .

"Owner or operator" is defined in the statute as:

> (20)(A)(ii) in the case of an onshore facility . . . any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of

> State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the facility.

42 U.S.C. § 9601(20).

Joslyn urges this court to read CERCLA's definition of "owner or operator" liberally and broadly to reach parent corporations whose subsidiaries are found liable under the statute. In doing so, Joslyn urges us to follow the several courts, including the Second Circuit, which have extended CERCLA liability to parents. *See New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Mottolo*, 695 F.Supp. 615 (D. N.H. 1988); *Colorado v. Idarado Mining Co.*, 707 F.Supp. 1227 (D. Col. 1989); *Vermont v. Staco, Inc.*, 684 F.Supp. 822 (D. Vt. 1988); *Idaho v. Bunker Hill Co.*, 635 F.Supp. 665 (D. Idaho 1986). We decline to do so.

Significantly, CERCLA does not define "owners" or "operators" as including the parent company of offending wholly-owned subsidiaries. Nor does the legislative history indicate that Congress intended to alter so substantially a basic tenet of corporation law. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if it is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917). Joslyn asks this court to rewrite the language of the Act significantly and hold parents directly liable for their subsidiaries' activities. To do so would dramatically alter traditional concepts of corporation law. The "normal

rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey*, 474 U.S. 494, 501, 106 S.Ct. 755, 759, 88 L.Ed.2d 859 (1986). Any bold rewriting of corporation law in this area is best left to Congress.

Appellants have pointed this court to little in the legislative history of CERCLA to indicate that Congress intended to make such a significant chance in corporation law principles. Powerline points to an "inherent" underlying intent of Congress to hold those who profited from hazardous waste sites responsible for the cost of cleanup and a desire to effectuate a timely cleanup of these sites. As the Court noted in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 267, 99 S.Ct. 2753, 2759, 61 L.Ed.2d 521 (1979), *reh. denied*, 444 U.S. 889, 100 S.Ct. 194, 62 L.Ed.2d 126 (reviewing Court of Appeals' decision modifying longshoreman's preexisting rights), "[S]ilence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." Without an express Congressional directive to the contrary, common-law principles of corporation law, such as limited liability, govern our court's analysis. *See Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1428 (D.C. Cir. 1988).

If Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so. The Seventh Circuit recently declined to expand the "owner or operator" definition, although it recognized the policy benefits inherent in a broad reading of the Act's scope. *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988) ("To the point that courts could achieve 'more' of the legislative objectives by adding to

the lists of those responsible, it is enough to respond that statutes have not only ends but also limits.").

As the district court observed, Congress is quite capable of creating statutes that hold shareholders or controlling entities liable for the acts of valid corporations. In fact, Congress adopted a "control" test in the next subsection of the statute. Under CERCLA, the term "owner or operator" is defined for facilities conveyed to state or local governments by bankruptcy, tax delinquency or abandonment, as "any person who owned, operated *or otherwise controlled* activities at such facility immediately" before conveyance. 42 U.S.C. Section 9601(20)(A)(iii) (emphasis added). No such "control" test appears in subsection (ii), the subsection at issue in this case, and we will imply none. Similarly, La.Rev.Stat.Ann. Section 30:2276 (West 1989 Supp.) does not impose direct liability on parent corporations for the acts of their subsidiaries.

Further, the facts here militate against piercing the corporate veil. Lincoln faithfully adhered to basic corporate formalities by keeping its own books and records and holding frequent shareholder and directors meetings. The daily operations of Lincoln and James Co. were separate. Hayes and Tooke were the most involved in the operations of Lincoln; neither was employed by James Co. Lincoln owned its own property, and the property was not used by James Co. Lincoln filed separate tax returns. Lincoln paid its own bills and made its own arrangement for employee benefits. The notes from the 1950 special shareholders meeting indicate that Lincoln operated quite independently from James Co.

The district court was correctly guided by our court's prior decision in *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014,

106 S.Ct. 1194, 89 L.Ed.2d 309 (1986). There are Circuit set out criteria for analyzing the issue of "control" in the parent/subsidiary context. In this case, the district court ran through the "laundry list" and properly found that the facts did not justify piercing the corporate veil. Veil piercing should be limited to situations in which the corporate entity is used as a *sham* to perpetrate a fraud or avoid personal liability. *See Jon-T, supra* at 691 (quoting *Baker v. Raymond International*, 656 F.2d 173, 179 (5th Cir. 1981) ("control required for liability under the 'instrumentality' rule amounts to total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation"). The facts in this case do not support a finding that Lincoln was designed as a bogus shell for James Co. to hide behind.

The district court allowed extensive discovery in this case. Appellants have pointed to those matters that they believe constitute a material issue of fact for determining whether James Co. can be held indirectly liable for Lincoln's activities. Those facts, if true, do not justify piercing the corporate veil. Therefore, the district court's grant of Jame Co.'s summary judgment motion was proper. We AFFIRM.

APPENDIX B

JOSLYN CORPORATION

v.

T.L. JAMES & COMPANY, INC., et al.

Civ. A. No. 87-2054.

United States District Court,
W.D. Louisiana,
Shreveport Division.

Sept. 19, 1988.

* * * * *

MEMORANDUM RULING

STAGG, Chief Judge.

Joslyn Corporation (hereinafter "Joslyn") initiated this action against, *inter alia*, T.L. James & Company, Inc. (hereinafter "T.L. James" or "James Company"), asserting an action under the Comprehensive Environmental Response, Compensation and Liability Act (hereinafter "CERCLA")[1] and the Louisiana Environmental Quality Act (hereinafter "LEQA").[2] The suit was instituted by Joslyn after the Louisiana Department of Environmental Quality had issued several orders to certain parties, including Joslyn, requiring the investigation and cleanup of a contaminated site in Bossier Parish, Louisiana that was

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[1] 42 U.S.C. §§ 9601-9657 (1982) and (Supp. V. 1987), *as amended by* Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613 (1986).

[2] La.Rev.Stat. 30:1051 *et seq.*

formerly a wood-treating and/or creosoting operation. The claims, cross claims, counterclaims and third party demands involved in this action are too numerous to list.

Presently under advisement are the following:

1. T.L. James's motion and renewed motion to dismiss plaintiff's complaint or, in the alternative, for summary judgment;
2. T.L. James's motion and renewed motion to dismiss the cross claim of Powerline Supply Company;
3. T.L. James's motion to dismiss the cross claim of the Louisiana and Arkansas Railway Company for failure to state a claim or, in the alternative, for summary judgment;
4. T.L. James's motion to dismiss the counterclaim of Lance D. Alworth; and
5. T.L. James's motion to dismiss the amended cross claim of Lance D. Alworth.

Though these motions present several issues, they all request the court to determine whether CERCLA imposes direct liability upon a parent corporation or requires a claimant to pierce the corporate veil before liability may attach. A recitation of material facts will be deferred until the court completes its analysis of this legal issue.

DIRECT OR DERIVATIVE LIABILITY?

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides, in relevant part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this Section—
>
> * * * * * *

> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of [shall be liable under this Section].

Under 42 U.S.C. § 9601(20)(A), the term "owner or operator" means "in the case of an onshore facility or an offshore facility, any person owning or operating such facility." "Person" includes an "individual, firm, corporation, association, partnership . . . commercial entity. . . ." *Id.* at § 9601.

Joslyn[3] argues that T.L. James must be deemed an "owner or operator" under CERCLA § 107(a) and is, therefore, directly liable. CERCLA does not specifically address the question of whether a court may hold a parent corporation or corporate officers liable for clean-up costs without first piercing the corporate veil. Several courts addressing the issue have held that corporate officers may be individually liable for hazardous waste clean-up under CERCLA.[4] The undersigned respectfully declines to adopt the analysis utilized by these courts because they

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[3] For the sake of brevity, reference will only be made to Joslyn's position which has been adopted by all the nonmoving parties against whom motions are presently under consideration.

[4] *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir.1985); *United States v. Ward*, 618 F.Supp. 884 (E.D.N.C. 1985); *United States v. Conservation Chemical Company*, 619 F.Supp. 162 (W.D.Mo.1985); *United States v. Mottolo*, 605 F.Supp. 898 (D.N.H.1985); *United States v. Carolawn Company*, 21 Env't Rep. Cas. (BNA) 2124 (D.S.C.1984); *United States v. Northeastern Pharmaceutical & Chemical Company (NEPAC-CO)*, 579 F.Supp. 823 (W.D.Mo.1984), *affirmed in part, reversed in part*, 810 F.2d 726 (8th Cir.1986); *United States v. Wade*, 577 F.Supp. 1326 (E.D.Pa. 1983). Also, in *Idaho v. The Bunker Hill Company*, 635 F.Supp. 665 (D.Id.1986), liability was imposed, without piercing the corporate veil, under CERCLA on a parent corporation held to be the "owner or operator" of a disposal facility.

have chosen to ignore the corporate form without an express congressional directive.

In *Berger v. Columbia Broadcasting System, Inc.*, 453 F.2d 991, 994 (5th Cir.1972), the Fifth Circuit made clear the importance of the corporate structure:

> It is elemental jurisprudence that a corporation is a creature of the law, endowed with a personality separate and distinct from that of its owners, and that one of the principal purposes for legal sanctioning of a separate corporate personality is to accord stockholders an opportunity to limit their personal liability.

See also, Baker v. Raymond International, Inc., 656 F.2d 173, 179 (5th Cir.1981) ("[t]he principle of limited liability remains a dominant characteristic of American corporate law."), *cert. denied*, 456 U.S. 983, 102 S.Ct. 2256, 72 L.Ed.2d 861 (1982); and *Krivo Industrial Supply Company v. National Distillers and Chemical Corp.*, 483 F.2d 1098, 1102 (5th Cir.1973) ("the corporate form . . . is not lightly disregarded since limited liability is one of the principal purposes for which the law has created the corporation."). In *Cort v. Ash*, 422 U.S. 66, 84, 95 S.Ct. 2080, 2090, 45 L.Ed.2d 26 (1975), the Supreme Court refused to create a federal private right of action for allegedly illegal corporate campaign contributions, holding that:

> Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.

In *Homan & Crimen, Inc. v. Harris*, 626 F.2d 1201, 1205 (5th Cir.1980), *cert. denied*, 450 U.S. 975, 101 S.Ct. 1506, 67 L.Ed.2d 809 (1981), Medenco, Inc. owned 100 per cent of the stock of Homan & Crimen, Inc., an unrelated

corporation doing business as Southwestern General Hospital. The hospital submitted its Medicare cost reports for two years, claiming $830,000 as a step-up in the cost basis of its assets. *Id.*[5] These were costs incurred by Medenco, Inc. In claiming entitlement to this amount, plaintiffs argued under 42 C.F.R. § 405.427 that "costs applicable to services, facilities, and supplies furnished to the provider by organizations related to the provider by common *ownership or control* are includable in the allowable cost to the provider at the cost to the related organization." *Id.* at 1208 (emphasis added).

Based upon this regulation, Homen & Crimen contended that "form should not be exalted over substance and the fiction of the separateness of the corporation and its shareholders should not be used to reach an unfair and unjust result." *Id.* The United States Court of Appeals for the Fifth Circuit rejected this argument:

> To this contention, the response must be that if the separateness of the corporation and its shareholders is a fiction, it is one which the law has long recognized and will not lightly go behind. [Citations omitted.] *For the regulation to cut through or ignore that mass of established corporate law upon which the Secretary relied would require at the very least a clear intention, a compelling case. It cannot be done by implication as plaintiffs suggest here.*

Id. (emphasis added.) Stated differently, "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress." *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 369 (1966). "Even where there is related federal legislation in an area, as is true in this instance,

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[5] *See*, 42 U.S.C. §§ 1395X and 1395F.

it must be remembered that 'Congress acts . . . against the background of the total corpus juris of the states . . . ." *Id., quoting from* Hart and Wechsler, *The Federal Courts and the Federal System* at p. 435 (1953).[6]

Based upon the foregoing authorities, this court holds that the corporate form, including limited liability for shareholders, is a doctrine firmly entrenched in American jurisprudence that may not be disregarded absent a specific congressional directive. Neither the clear language of CERCLA nor its legislative history provides authority for imposing individual liability on corporate officers or direct liability on parent corporations.[7] Though it is recognized that CERCLA was enacted in the "waning hours of the 96th Congress," and was "the product of apparent legislative compromise [that] is not a model of clarity," *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir.1988), this court will not read into the statute a provision disregarding decades of corporate law. The court's conclusion is buttressed by the fact that Congress has, in the past, specified that share-

[6] *See also, Burks v. Lasker*, 441 U.S. 471, 478-79, 99 S.Ct. 1831, 1837-38, 60 L.Ed.2d 404 (1979) (holding that in actions asserting violations under the Investment Company Act and the Investment Advisors Act, federal courts must apply state corporate law governing the authority of independent directors to discontinue shareholders' derivative actions because corporate law is not an area in which these statutes authorize federal courts of "fashion a complete body of federal law); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 413-14, 92 S.Ct. 2247, 2263-64, 33 L.Ed.2d 11 (1972) (refusing to pierce veil of union political fund despite evidence of control and domination, in view of compliance with formal statutory requirements).

[7] Comment, *Corporate Officer Liability for Hazardous Waste Disposal: What Are the Consequences?*, 38 Mercer L.Rev. 677, 679 (1987).

holders or controlling parties are to be held responsible for the acts or debts of a valid corporation. *See, e.g.*, Depository Institution Management Interlocks Act, 12 U.S.C. §§ 3201-3207; I.R.C. § 1239(b)(2), (3) (1976); Fair Labor Standards Act § 3(r), 29 U.S.C. § 203(r); and ERISA § 4001(b), 29 U.S.C. § 1301(b)(1); *see also*, 16 C.F.R. § 15.482 (1981). Absent a similar provision in CERCLA, this court finds no direct liability against James Company

THE RULE OF DECISION

It is undisputed that federal law governs in actions arising under nationwide federal programs. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726, 99 S.Ct. 1448, 1457, 59 L.Ed.2d 711 (1979). The question is whether state law should be adopted as the rule of decision or whether federal common law should control. As the Supreme Court has noted:

> That the statutes authorizing these federal lending programs do not specify the appropriate rule of decision in no way limits the reach of federal law. It is precisely what Congress had not spoken "in any area comprising issues substantially related to an established program of governmental operation, [citation omitted,] that *Clearfield* [*Trust Company v. United States*, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838 (1943)] directs federal courts to fill the interstices of federal legislation according to their own standards."

440 U.S. at 727, 99 S.Ct. at 1458, *quoting from* Mishkin, *The Variousness of "Federal Law": Competence and Discretion and the Choice of National and State Rules for Decision*, 105 U.Pa.L.Rev. 797, 800 (1957). The normal course of analysis would require this court to apply the test set forth in *United States v. Kimbell Foods, Inc.*, *supra*, as explained by *Georgia Power Company v. San-*

ders, 617 F.2d 1112 (5th Cir.1980) (en banc), *cert. denied*, 450 U.S. 936, 101 S.Ct. 1403, 67 L.Ed.2d 372 (1981). This inquiry, however, is unnecessary because the Fifth Circuit has held:

> [W]e find no need to determine whether a uniform federal alter ego rule is required, since the federal and state alter ego tests are essentially the same. Our non-diversity alter ego cases have rarely stated whether they were applying a federal or state standard, and have cited federal and state cases interchangably.

United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 690 n. 6 (5th Cir.1985), *cert. denied*, 475 U.S. 1014, 106 S.Ct. 1194, 89 L.Ed.2d 309 (1986) (citations omitted)[8].

The Fifth Circuit in *Jon-T Chemicals* then proceeded to set forth general standards of piercing the corporate veil that have evolved in this circuit. In *Krivo Industrial Supply Company v. National Distillers & Chemical Corp.*, 483 F.2d 1098, 1102 (5th Cir.1973), the Fifth Circuit noted: "[o]ne of the most difficult applications of the rule permitting the corporate form to be disregarded arises when one corporation is sought to be held liable for the debts of another corporation." Unless the parent corporation expressly or impliedly assumes responsibility for the debts of the subsidiary, liability will attach only when the parent "misuses that corporation by treating it, and by using it, as a mere business conduit for the purposes of

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[8] For a view that state alter ego, as opposed to federal common law, will conflict with the purposes of CERCLA, *see*, Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 Harv.L.Rev. 986 (1986). Though the Court in *Jon-T* was faced with Texas law, the undersigned is satisfied that the principles utilized in this opinion would control whether Louisiana or federal common law governs. *See, infra*, at 232-33.

the dominant corporation." *Id.* Two elements are held to be essential:

> First, the dominant corporation must have controlled the subservient corporation, and second, the dominant corporation must have proximately caused plaintiff harm through misuse of this control.

Id. at 1103, *citing, inter alia, Berger v. Columbia Broadcasting System, Inc.*, 453 F.2d 991 (5th Cir.), *cert. denied*, 409 U.S. 848, 93 S.Ct. 54, 34 L.Ed.2d 89 (1972). The Court further held:

> The control required for liability . . . amounts to total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation.

Krivo, 483 F.2d at 1106. In so holding, the Fifth Circuit adopted the recommendation of Professor Fletcher:

> The control necessary to invoke what is sometimes called the 'instrumentality rule' is not mere majority or complete stock control but such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal.

Id., quoting from 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 43 (Perm. ed. rev. 1963). *See also, Jon-T Chemicals*, 768 F.2d at 691; and *Baker v. Raymond International, Inc.*, 656 F.2d 173, 180 (5th Cir.1981). In determining whether a parent corporation has exercised the requisite degree of control over a subsidiary to pierce the corporate veil, the Fifth Circuit has developed a laundry list of factors. These include whether:

(1) the parent and the subsidiary have common stock ownership;

(2) the parent and the subsidiary have common directors or officers;

(3) the parent and the subsidiary have common business departments;

(4) the parent and the subsidiary file consolidated financial statements and tax returns;

(5) the parent finances the subsidiary;

(6) the parent caused the incorporation of the subsidiary;

(7) the subsidiary operates with grossly inadequate capital;

(8) the parent pays the salaries and other expenses of the subsidiary;

(9) the subsidiary receives no business except that given to it by the parent;

(10) the parent uses the subsidiary's property as its own;

(11) the daily operations of the two corporations are not kept separate; and

(12) the subsidiary does not observe the basic corporation formalities, such as keeping separate books and records and holding shareholder and board meetings.

Jon-T Chemicals, 768 F.2d at 691-92 (citations omitted). Resolution of the alter ego issue is "heavily fact-specific" and requires an evaluation of the totality of the aforementioned factors. *Id.* at 694.

THE FACTS

This dispute is over the materiality of facts, not their existence. Lincoln Creosoting Company, Inc. (hereinafter "Lincoln") was incorporated in the State of Louisiana on December 4, 1935. The idea to form Lincoln came from Messrs. Tooke and Hayes, who approached Mr. T.L. James. Mr. James paid $20,110 for 120 shares of voting common stock of Lincoln and 200 shares of non-voting preferred stock. C.A. Tooke and J.R. Hayes received 40 shares each of the voting common stock of Lincoln for a total of 40 per cent of the Lincoln stock. All outstanding stock certificates, however, were accompanied by endorsements back to the James Company. The endorsements of Tooke and Hayes were to the effect that they have endorsed the stock to T.L. James "where it shall remain until such time as their earnings from dividends on the stock shall have repaid the par value of the stock."[9] Since Lincoln never paid any common stock dividends, James Company had control over 100 per cent of Lincoln's stock.

Lincoln's first board of directors consisted of seven members: Mr. T.L. James, Mrs. T.L. James Jr., Mr. G.W. James, Mr. Floyd B. James, Mr. C.A. Tooke, Mr. J.R. Hayes and Mr. V.A. Davidson. Excluding Messrs. Tooke and Hayes, all were officers, directors and/or shareholders of T.L. James & Company. At the first meeting of the Lincoln Board of Directors, Mr. Tooke, who was vice president

[9] This is evidenced by a letter from J.C. Love Jr. of T.L. James to the vice president of the National Surety Corporation dated May 25, 1948. The letter goes on to state: "While actually T.L. James & Company only owns 60 per cent of the capital stock, they do, as of this time, control the full 100 per cent and will continue to do so until such time as dividends may have repaid all the original value of 40 per cent owned by the operators." Joslyn Exhibit 8.

of Lincoln, was designated as general manager with full power and discretion to conduct the corporation's affairs.

The property at issue in this suit was purchased in Lincoln's name on December 17, 1935. At least since 1936, Lincoln had its own bank account at the Commercial National Bank in Shreveport. Checks were signed jointly by Messrs. Tooke and Hayes. From its inception, Lincoln frequently and periodically held separate meetings of the directors and shareholders. At the annual shareholders meetings, Mr. Tooke was responsible for making the report of the preceding year and outlining policy for the coming year.

Mr. T.L. James died in July of 1944. On September 11, 1944, the Lincoln directors met and chose Mr. G. William James as the successor-president of Lincoln. Mr. G. William James served as president of Lincoln from 1944 through 1950.

In 1943 and 1944, Lincoln lost money. In the summer or fall of 1944, Mr. G.W. James approached J.E. Lacy concerning employment with Lincoln. James offered Lacy $1,000 a month for three months to "go over there [to Lincoln] and see what was the matter with this plant, why it wasn't making any money."[10] Lacy accepted the job and worked for three weeks. Lacy surmised that the problem at Lincoln was an internal fight between Messrs. Tooke and Hayes. According to Lacy, "Hayes's ambition was to get out and get a plant of his own. So he was not doing the things he should be doing, and that left Tooke with the inability to make the plant operate properly."[11]

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[10] Deposition of Lacy at 15, Joslyn Exhibit 15.

[11] *Id.* at 16.

Subsequent thereto, Lacy was employed by Lincoln. This came about after G.W. James bought out Hayes' interest. Lacy was placed in charge of production. Lacy, however, was only on Lincoln's payroll and not that of T.L. James & Company. At a shareholders meeting on March 13, 1945, a resolution was passed thanking Hayes for his service to Lincoln and noting that Hayes was "the originator of the ideas which developed Lincoln."[12] At the same meeting, G.W. James was reelected president and Tooke was reelected vice president. V.A. Davidson was elected secretary, replacing Mr. Hayes.

At a directors meeting on October 8, 1945, a new resolution was passed pursuant to which Messrs. Tooke, Lacy and Plummer were authorized to sign checks on behalf of Lincoln.

At a special shareholders meeting on March 3, 1947, the number of directors was increased to eight. Four of these were Lincoln employees and four were affiliated with James Company. The four Lincoln employees were Tooke, Freeman, Lacy and Plummer.

A special board meeting was held on December 29, 1947, at which time it was agreed that due to rather substantial obligations of Lincoln, it would not be advisable to consider any common stock dividends on account of the 1947 earnings. Upon the motion of J.C. Love, however, it was agreed that $20,000 be presented to Centenary College toward the T.L. James Memorial Fund.

At the regular annual meeting of stockholders on March 9, 1948, Tooke reported that the "future of the treating

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[12] *See* Attachment "C" to T.L. James' Statement of Undisputed Facts at 67.

business is rather a vague picture." [13] The vagueness was due to the declining demand for creosoted products as the result of consumers' inability to secure wire and transformers. In addition, the creation of new creosoting plants was noted to have caused the supply of creosoted items to be unreasonably large. Despite this, Tooke stated his belief that the 1948 operations would be profitable. G.W. James commented at this meeting that he felt "the management of the creosoting business was to be commended for assuming such a logical attitude with reference to the forthcoming problems."[14]

At a special directors meeting held on December 16, 1949, a resolution was passed granting authority to any two among C.A. Tooke (vice president), H.R. Freeman (director) and W.W. Colbert (purchasing agent) to make withdrawals from Lincoln's corporate account at Commercial National Bank in Shreveport. This resolution was approved by G.W. James and Mr. Davidson.

Mr. Tooke died on May 4, 1950. As a result, a special meeting of Lincoln's Board of Directors was held on May 15, 1950. G.W. James stated that he "felt very keenly the loss of not only the sincere friendship, but the keen business judgment of C.A. Tooke."[15] Mr. James further stated that the purpose of the meeting was to try to decide what course should be followed without the leadership of Mr. Tooke. James stated that: "As everyone knew, Lincoln Creosoting Company had originally been organized through the efforts of Mr. Tooke and that it had been the attitude of those in Ruston that it was Mr. Tooke's enterprise and

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[13] *Id.* at 84.

[14] *Id.* at 85.

[15] *Id.* at 98.

had been since it was first organized." Without the leadership of Mr. Tooke, it was G.W. James' opinion and the opinion of those in Ruston that the business should be sold. It was agreed at the meeting that every effort should immediately be made to sell Lincoln. In the event that a purchaser could not be secured, it was agreed that plans would be made for an orderly liquidation. Since Mr. Lacy was most familiar with the general management of the business, it was agreed that he would assume the position formerly held by Mr. Tooke. It was then approved that Lacy's name would be added to the list of names of any two required signatures to withdraw funds from Lincoln's account. Floyd B. James stated that, "it was his opinion and that of the members he had spoken with that the corporation was indebted to Mr. Tooke for the development of the corporation from its infancy to its present status and that in view of these facts he moved that the corporation pay to Mrs. Tooke, the widow of C.A. Tooke, his salary for a period of twelve months. . . ."[16]

A special meeting of stockholders was held on July 20, 1950 for the purpose of considering the sale of Lincoln's principal assets. Mr. Lacy outlined a proposition to purchase Lincoln that had been made by Joslyn Manufacturing & Supply Company. After a general discussion of the proposal, a resolution was introduced by Mr. Plummer which authorized G.W. James to execute a memorandum agreement with Joslyn Manufacturing & Supply Company for the sale of Lincoln's physical plant and real estate, the entire black stock inventory, the entire white stock inventory, the entire stock of creosote oil and the entire account of usable transient freight. This resolution was

[16] *Id.* at 99.

unanimously adopted by the Board of Directors on July 20, 1950.

The shareholders voted on December 27, 1950 to repurchase as treasury stock 41 shares of common stock held by Messrs. Lacy, Freeman and Plummer, and the Tooke heirs. The shareholders also agreed that all 200 shares of preferred stock held by James Company, which were the original capitalization of Lincoln, should be redeemed at par value of $100 a share plus accrued dividends to the next dividend date.

At the March 20, 1951 annual meeting of the Board of Directors, Lacy advised that the transfer of Lincoln's properties to Joslyn Manufacturing Company was nearly complete and that all miscellaneous items of charge and credit had been settled. The only matter remaining to consummate the sale was the payment of the monthly amount, as provided for in the memorandum agreement. Mr. Lacy then summarized the outstanding business matters to be resolved and stated that, in his estimation, the entire affairs of the creosoting company should be completed well in advance of the close of the 1951 calendar year. The same eight directors who had served since 1947 were reelected, with the exception of C.A. Tooke Jr., who was elected to replace the late C.A. Tooke.

On November 26, 1951, the shareholders of T.L. James & Company, Inc. held a special meeting "to consider the desirability . . . of mak[ing] a contribution or donation from T.L. James & Company, Inc. to Centenary College of Louisiana . . . consisting of all shares of stock of Lincoln Creosoting Company, Inc. presently owned" by James Company.[17] A resolution was unanimously passed authoriz-

[17] *See*, Attachment "D" at 195 to T.L. James' Statement of Undisputed Facts.

ing this donation. The James Company Board of Directors approved this resolution on December 10, 1951.

On December 19, 1952, a Certificate of Dissolution was signed dissolving Lincoln. According to the Certificate, "all debts, obligations and liabilities of this corporation have been paid and discharged," that "there are no suits pending against this corporation in any Court," and that the assets have been distributed to the shareholders "in accordance with their respective rights and interests."[18]

ANALYSIS OF LAW AND FACTS

Joslyn urges that six of the twelve factors cited in *Jon-T Chemicals, supra,* support the conclusion that the corporate veil should be pierced. Specifically, Joslyn points out that the parent and subsidiary have common stock ownership as well as common directors. It is further urged by Joslyn that the positions held by G.W. James and Mr. Davidson constituted direct control over Lincoln's finances.[19] These facts are undoubtedly true and material:

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[18] Attachment "A" to T.L. James' Statement of Undisputed Facts.

[19] In support of this contention, Joslyn refers to two letters from G.W. James and V.A. Davidson to their accountant. The letters were written in regard to an IRS audit concerning these individuals' salaries from Lincoln. Contained in the letters are statements that these directors were consistently involved in the financial affairs of Lincoln, and that Mr. Davidson served as a contact between plant personnel and G.W. James. Though these letters evidence minimal control in financial affairs, they bear no weight in determining control over the nuts and bolts of Lincoln's operations and the day-to-day affairs. It must be remembered that the corporate veil will not be pierced unless the parent's control "amounts to total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interest of its own and functions solely to achieve the purposes of the dominant corporation. *Krivo,* 483 F.2d at 1106. "Merely taking an active part in the management of the debtor corporation does not automatically constitute control. . . ." *Id.* at 1105.

> Nevertheless, our cases are clear that 100 per cent ownership and identity of directors and officers are, even together, an insufficient basis for applying the alter ego theory to pierce the corporate veil. [*Citing Nelson v. International Paint Company*, 734 F.2d 1084, 1092 (5th Cir.1984) and *Miles v. AT & T*, 703 F.2d 193, 195 (5th Cir.1983).] Instead, we maintain the fiction that an officer of director of both corporations can change hats and represent the two corporations separately, despite their common ownership.

Jon-T Chemicals, 768 F.2d at 691; *see also*, *Baker*, 656 F.2d at 180 ("Ownership of a controlling interest in a corporation entitles the controlling shareholder to exercise the normal incidence of stock ownership . . . without forfeiting the protection of limited liability."); and *Berger*, 453 F.2d at 994 (same).

Joslyn also points out that James Company made substantial loans to Lincoln, including the initial capitalization. The uncontroverted record establishes, however, that these loans were repaid. In any event, "the general rule is that the mere loan of money by one corporation to another does not automatically make the lender liable for the acts and omissions of the borrower." *Krivo*, 483 F.2d at 1104, *citing Peterson v. Chicago, Rock Island and Pacific Company*, 205 U.S. 364, 27 S.Ct. 513, 51 L.Ed. 841 (1907). Joslyn also asserts that the James Company hired and fired Lincoln's executive officers. This allegation is based upon the hiring of Lacy and the resignation of Hayes. Though this is minimally indicative of control, it can hardly be said to rise to the level justifying disregard of the corporate form. Indeed, "to justify a judicial derogation of the separateness of a corporate creature, an aggrieved party must prove something more than . . . the parent's use of its power as an incident of its stock owner-

ship to elect officers and directors of the subsidiary." *Berger*, 453 F.2d at 994.

Joslyn also takes issue with the fact that T.L. James Sr., G.W. James and V.A. Davidson worked out of James Company's corporate offices. Lincoln neither had a lease nor paid rent for the use of these offices. Once again, this is only marginally relevant. These individuals were officers of both corporations. Clearly, they had to work somewhere. That they chose to work out of James Company's corporate offices simply is not sufficient to disregard the separate corporate structures.

The lengthy factual account set forth above establishes beyond doubt that Lincoln strictly adhered to basic corporate formalities by keeping its own books and records and frequently and periodically holding shareholder and director meetings. The daily operations of Lincoln and James Company were kept separate. The driving forces behind Lincoln were Messrs. Hayes and Tooke, neither of whom was employed by James Company. Lincoln owned its own property where the physical plant was situated. This property was not utilized for the business of James Company. None of Lincoln's employees were on the payroll of James Company. Though James Company provided capital for Lincoln's initial incorporation, it was the effort and initiative of Messrs. Tooke and Hayes that resulted in the formation of Lincoln. Lincoln filed separate income tax returns.

In addition to these compelling facts, it should also be noted that Lincoln paid its own bills and made arrangements for employee benefits such as sick pay, retirement and profit sharing. Lincoln Creosoting's invoices directed that payment be made to Lincoln and not to James Company.

SUMMARY JUDGMENT STANDARDS

The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses in the spirit of the rule requiring a just, speedy and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986); *Meyers v. M/V Eugenio C*, 842 F.2d 815, 816-17 (5th Cir.1988). Indeed, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole. . . ." *Celotex*, 106 S.Ct. at 2555, *citing* Fed.R.Civ.P. 1 and Schwarzer, *Summary Judgment Under The Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984).

A party seeking summary judgment always bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 106 S.Ct. at 2553. A defendant moving for summary judgment may rest on the absence of evidence to support an essential element of the plaintiff's case. *Celotex*, 106 S.Ct. at 2554; *International Association of Machinists and Aerospace Workers, AFL-CIO, Lodge No. 2504 v. Intercontinental Manufacturing Company, Inc.*, 812 F.2d 219, 222 (5th Cir.1987). Once this burden has been established, the burden shifts to the nonmoving party to demonstrate a genuine issue of material fact. *Matsushita Electric Industrial Company v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). If the evidence is merely colorable or not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). In fact, the nonmoving party has an affirmative duty to come forth

with "significant probative evidence demonstrating the existence of a triable issue of fact." *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 877 (5th Cir.1984).

The summary judgment standard has been said to mirror that of Fed.R.Civ.P. 41(b) for involuntary dismissal in nonjury cases. *Professional Managers v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218, 223 (5th Cir.1986). In this respect, Judge Rubin has noted:

> If the decision is to be reached by the court, and there are no issues of witness credibility, the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, even though decision may depend on inferences to be drawn from what has been incontrovertibly proved . . . even if that conclusion is deemed 'factual' or involves a 'mixed question of law and fact.' A trial on the merits would reveal no additional data. Hearing and viewing the witnesses subject to cross-examination would not aid the determination if there are neither issues of credibility nor controversies with respect to the substance of the proposed testimony. The judge, as trier of fact, is in a position to and ought to draw his inferences without resort to the expenses of trial.

Nunez v. Superior Oil Company, 572 F.2d 1119, 1123-24 (5th Cir.1978).

The court is satisfied that James Company fulfilled its initial burden by first proving that liability will attach only if the corporate veil is pierced and then by establishing, through competent proof, facts showing that under the governing substantive law the corporate form should not be disregarded. Joslyn's rebutting facts and arguments, even considered in their totality, simply do not constitute significant probative evidence demonstrating a triable issue of fact. This is especially true in this nonjury case

where substantial discovery has been conducted. This court was particularly liberal in affording the parties ample opportunity to brief the legal issues and provide supporting documentation. Joslyn has not made the court aware of any uncompleted discovery which would be relevant toward the issue of derivative liability. Stated differently, Joslyn has not come forward with proof demonstrating a triable issue of fact as to whether the James Company exercised total domination over Lincoln to the extent that Lincoln manifested no separate corporate interest of its own and functioned solely to achieve the purposes of James Company. *Jon-T Chemicals*, 768 F.2d at 691; *Krivo*, 483 F.2d at 1106. There is simply no proof that James Company had complete domination of finances, policies and practices to cause Lincoln to be not a separate business entity but a mere conduit of James Company. *Id.*

Based on the foregoing, the court concludes that summary judgment be GRANTED in favor of T.L. James & Company, and that all claims against it be DISMISSED WITH PREJUDICE.[20] Assuming, without deciding, that

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[20] Though this court declined to follow that analysis utilized by the cases cited in footnote 4, *supra*, it is noteworthy that this court would have likely reached the same result under applicable corporate law at least in *Conservation Chemical*, *Mottolo* and *Shore Realty*. These cases involved factual situations where the personal participation in the illegal disposal of hazardous waste by the corporate officers was significant. As one commentator has noted, these "courts have avoided the common law rule of limited liability by either explicitly or implicitly applying a generally recognized exception; a corporate officer is liable for the wrongful acts of a corporation when he personally participates in the wrongful conduct." Comment, 38 Mercer L.Rev. at 685. If T.L. James & Company and its officers and directors had been actively involved in the day-to-day operations of Lincoln, including the disposal of hazardous waste, then, arguably, liability would attach. *See, generally, Shingleton v. Armor Velvet Corp.*, 621 F.2d 180 (5th Cir.1980); *L.C.L. Theatres, Inc. v. Columbia Pictures Industries, Inc.*, 619 F.2d 455 (5th Cir.1980); *Tillman v. Wheaton-Haven Recreation Associations, Inc.*, 517 F.2d 1141 (5th Cir.1975).

the LEQA is constitutional and Joslyn has satisfied prerequisites to filing an action, the foregoing analysis establishes that Joslyn cannot pierce the corporate veil under Louisiana law, which utilizes a similar if not more stringent rule than that applied in this opinion. *See, generally, GRW Engineers, Inc. v. Elam*, 504 So.2d 117, 120 (La. App. 2d Cir.1987), *writ denied*, 506 So.2d 1230 (La.1987); *Harris v. Best of America, Inc.*, 466 So.2d 1309, 1315 (La. App. 1st Cir.1985), *writ denied*, 470 So.2d 121 (La.1985); *Kingsman Enterprises, Inc. v. Bakersfield Electric Company, Inc.*, 339 So.2d 1280, 1282 (La.App. 1st Cir.1976); *Menard v. Associated Royal Crown Bottling Company*, 249 So.2d 363, 364-65 (La.App. 4th Cir.1971). Accordingly, summary judgment must be GRANTED in favor of T.L. James & Company with respect to claims against it under LEQA.

An order consistent with the terms of this memorandum ruling shall issue herewith.

APPENDIX C

[Dated March 26, 1990]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4901

JOSLYN MANUFACTURING COMPANY,
Plaintiff-Appellant,

v.

T.L. JAMES & CO., INC.,
Defendant-Appellee,

v.

POWERLINE SUPPLY CO., INC.,
Defendant Third Party
Plaintiff-Appellant,

and

Nelda S. ELLIOT, Bill Elliott, and Lance D. Alworth, Louisiana and Arkansas Railroad Co.,
Defendants-Appellants,

v.

Floyd Benjamin JAMES and George William James, Sr.,
Third Party
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING

(March 26, 1990)

Before GEE and JONES, Circuit Judges, and HUNTER, District Judge:*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF
THE MANDATE

* District Judge of the Western District of Louisiana sitting by designation.

APPENDIX D

CERCLA

42 U.S.C. § 9601

(9) "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel;

. . .

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

. . .

(21) The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

APPENDIX E

CERCLA

42 U.S.C. § 9607

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

APPENDIX F

CERCLA

42 U.S.C. § 9613

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.